

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1352

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

JOHN H. WILSON, JR.,

Petitioner-Appellee,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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v.

UNITED STATES OF AMERICA,
Respondent-Appellant.

On Appeal From the United States District Court
For the Western District of New York

BRIEF FOR THE APPELLANT

Preliminary Statement

On November 24, 1975, the defendant pleaded guilty to possession of heroin with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1). Two days later, he was sentenced to five years imprisonment to be followed by a mandatory special parole term of six years. No appeal was taken from the conviction or sentence.

On March 29, 1977 Wilson filed a motion under Title 28, United States Code, Section 2255, to set aside his conviction alleging that the "court failed to explain to the petitioner the

consequences of his guilty plea as it pertained to special parole". In a decision and order dated August 2, 1977, the Honorable John T. Elfvin granted the motion and set aside the guilty plea.

The Government appeals from this decision and order.

Statute and Rule Involved

Title 21, United States Code, Section 841 provides in pertinent part as follows:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both . . . Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment . . .

(c) A special parole term imposed under this section or Section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to

serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or Section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

At the time the defendant pleaded guilty in November 1975, Rule 11 of the Federal Rules of Criminal Procedure provided in pertinent part as follows:

. . . The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . .¹

Statement of the Case

On July 30, 1975, a Federal Grand Jury filed a one count indictment charging John Wilson, Jr., and John Walker with possession of heroin with intent to distribute (App. 7). The trial of the defendants began before Judge Elfvin on September 16, 1975 and ended three days later when the court declared a mistrial after learning that one of the jurors was familiar with the crime scene.

On September 23, 1975, Wilson pleaded guilty to the indictment (App. 9-23). At that time, the court addressed the defendant and informed him of the nature of the charge against him, that he had the right to persist in his plea of not

¹ Effective December 1, 1975, Rule 11 was extensively revised and the language regarding "consequences of the plea" was deleted. Subparagraph (c) was added in its place and requires the court to inform the defendant of specific matters, including the nature of the charge, the maximum punishment which may be imposed and constitutional rights the defendant is waiving by pleading guilty.

guilty and to have his case tried by a jury with the assistance of counsel, and that he had the right to confront and cross-examined the witnesses against him. Furthermore, the court advised him that he could be convicted upon his plea of guilty alone without the necessity of any trial. Finally, the court told Wilson that he would be placed under oath and asked question about the offense in order to satisfy the court that there was a factual basis for his plea. The defendant then testified about his involvement in the crime.

At the time Wilson entered the guilty plea, he told the court that he understood that the United States Attorney would recommend that his sentence not exceed a term of five years imprisonment. The following discussion then took place:

The Court: You have been told that I do receive recommendations from the United States Attorney's Office, have you also been told that this is merely a recommendation to me and that I don't bind myself to follow that to any degree?

Defendant: Yes, sir, your Honor, you have an option to sentence me up to fifteen years.

The Court: Mr. Burns, is it true that there has been this promise of a recommendation?

Mr. Burns: Yes, your Honor, and that promise is that the United States Attorney will recommend to the Court that it not impose any sentence in excess of five years imprisonment (App. 20-21).

Next, there followed a discussion regarding the maximum penalty which could be imposed:

Mr. Burns: Perhaps we might state for the record the maximum bounds. The maximum penalty that could be imposed—

The Court: I think I indicated fifteen years.

Mr. Burns: Fifteen years plus a fine of not to exceed \$25,000, and also a mandatory special parole term, if the Court should see fit to impose a term of imprisonment.

The Court: That is right. There is in this situation this tack-on of a mandatory three year probationary period, regardless of what the imprisonment might be. In other words, if I were to sentence you to three years or six years, whatever it would be, in addition to that there would be a servitude of three years of probation after the imprisonment, do you understand that?

Defendant: Yes, sir, your Honor (App. 21-22).

When the defendant appeared for sentencing on October 20, 1975, Judge Elfvin said that statements Wilson had made to the Probation Officer which had been included in the pre-sentence report were inconsistent with his plea of guilty since the statements suggested the possibility of an entrapment defense (App. 25-48). Therefore, over defense and Government objection the plea was vacated and the case was set for trial.

On November 24, 1975, the defendant once again attempted to plead guilty to the indictment. Wilson was placed under oath and made admissions which Judge Elfvin found sufficient to provide a factual basis for the plea (App. 50-61). Two days later, on November 26, 1975, Wilson was sentenced to five years imprisonment to be followed by a special parole term of six years (App. 64-65).

Wilson did not appeal the conviction or sentence. However, in a letter to Judge Elfvin, dated December 19, 1975, he asked for clarification or modification of his sentence. The letter read in part as follows:

My interest now are concerned with the Federal sentence from a twofold perspective: (1) The write is

somewhat perplexed as to what ligature the six (6) years probational period has on the length of his incarceration. It is my understanding that the probational period decreases the length of incarceration while increasing the Federal jurisdiction duration, please clarify. (2) If this is not the present situation, I would like to request of this United States Court that my present sentence be placed under U.S.C. 4208 an A2 sentence (App. 67).

In an endorsement on the letter, Judge Elfvin wrote "modification of sentence denied" dated February 11, 1976.

On March 7, 1977, while serving his sentence at Allenwood Federal Prison Camp, Wilson filed a "Petition for Appropriate Relief", based upon a change in the parole guidelines after the date of his sentencing (App. 80-84). On March 17, 1977, he filed a Motion to Vacate, Set Aside, or Correct Sentence (App. 72-77). In paragraph 12A of the motion, he specified his grounds for relief as follows:

At the time of sentencing the court failed to explain to the petitioner the consequence of his guilty pleas as it pertained to special parole. The sentencing minutes November 26, 1975 make no reference to such an explanation—the court on this date did not discuss the consequence of his guilty plea with regard to the special parole aspect of the sentence.

The Government responded to the *habeas corpus* petition, opposing the relief requested and citing the recent decision of this court in *DelVecchio v. United States*, 556 F2d 106 (2nd Cir. 1977) as controlling (App. 86-93).

In a memorandum and order dated August 2, 1977, Judge Elfvin found that "the petitioner was not fully aware of the consequences of his plea of guilty" (App. 97). Relying on this Court's decision in *Ferguson v. United States*, 513 F2d 1011 (2nd Cir. 1975), Judge Elfvin concluded that Wilson was en-

titled to have his plea vacated and to plead anew because "the record indicates that (he) was not informed of the applicability and nature of the special parole term prior to pleading guilty" (App. 96-97). The Court made no mention of the Government's argument that *DelVecchio* was controlling. In view of the finding with respect to compliance with Rule 11, the court made no ruling on the effect of changes in the parole guidelines on Wilson's sentence.

Wilson appeared before Judge Elfvin on September 2, 1977 and entered a plea of not guilty to the indictment. He was released on \$5,000 bail pending appeal.

Question Presented

Is a defendant entitled to have his plea of guilty set aside upon collateral attack because of the court's incorrect advice to him at the time of his plea regarding the possible length of the mandatory special parole term when the defendant's sentence did not exceed the maximum specified by the court at the time of the plea?

POINT I

Despite the trial judge's incorrect advice to the defendant regarding the length of the mandatory special parole term, the defendant is not entitled to have his guilty plea set aside on collateral attack since his sentence was within the maximum specified by the court at the time of the plea and the defendant has demonstrated no prejudice.

This appeal presents the question of whether the trial judge's failure to advise a defendant of the possible length of a special parole term before he pleaded guilty to a narcotics

violation warrants vacating the defendant's conviction in a *habeas corpus* action brought by the defendant one and one half years after the plea where the defendant's sentence was less than he had been advised was the maximum he could receive.

This is not a case of first impression in this Circuit. In *DelVecchio v. United States*, 556 F2d 106 (2nd Cir. 1977), this Court held that a defendant in these circumstances was not entitled to have his conviction set aside. The Government submits that the instant case is controlled by the holding in *DelVecchio*.

Joseph DelVecchio pleaded guilty to various narcotics offenses in January 1974. At the time of his plea, the court advised him that he could be sentenced to thirty years imprisonment on each of the seven counts to which he pleaded guilty, a total of 210 years. Unfortunately, the trial judge failed to advise DelVecchio that the statute required that he impose a mandatory special parole term of at least three years if the sentence included a term of imprisonment. Several months later, the Court sentenced DelVecchio to fifteen years imprisonment on one count, and concurrent sentences of five years on the remaining six counts, with a three year special parole term to follow the prison term. DelVecchio did not appeal. Instead, almost two and one half years later, he filed a *habeas corpus* action under Section 2255 claiming, among other things, that he was entitled to withdraw his guilty plea because he had not been advised of the mandatory special parole term at the time of his guilty plea. The district court denied the petition and this Court affirmed.

It is now settled that a mandatory special parole term to be served upon completion of a prison term is indeed a "consequence" of a guilty plea which must be explained to the

defendant at the time of the plea. *Michel v. United States*, 507 F2d 461, 463 (2nd Cir. 1974). If the defendant is not advised of the special parole term, he may be entitled to withdraw his plea of guilty at a later date. *Ferguson v. United States*, 513 F2d 1011 (2nd Cir. 1975). Recently, this Court has made clear that there must be strict compliance with Rule 11 and failure to do so will result in guilty pleas being vacated on direct appeal. *United States v. Journet*, 544 F2d 633, 635 (2nd Cir. 1976).

However, when there has been a violation of Rule 11 and the defendant takes no appeal but, instead, files a *habeas corpus* action years after the plea, this Court has held that different considerations come into play. *DelVecchio v. United States*, 556 F2d at 109. These considerations include the principle of finality in criminal cases and the possibility that an obviously guilty defendant may go free because the Government could not successfully prosecute him years after the offense.²

Because of these considerations, this Court said in *DelVecchio* that "on collateral attack, the court may allow for more play in the joints in assessing the effects of a Rule 11 violation" and "there must be flexibility in the collateral review of a Rule 11 claim". *Id.* at 110-111. After citing the various standards for collateral review in other Circuits, the Court held that "a defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order to succeed in a collateral attack based upon a Rule 11 violation". *Id.* at 111.

The Court then noted that the combination of the prison sentence and the special parole term—fifteen years plus three

² This latter consideration is a very real one in this case since the drug evidence has been destroyed (App. 92).

years—was substantially less than the total DelVecchio was advised was the maximum punishment possible. Furthermore, DelVecchio was represented by a very experienced attorney and made no claim in his 2255 action that he would have acted any differently had he been advised of the possibility of a special parole term. Under all of these circumstances, the Court concluded that the judge's failure to mention the special parole term did not prejudice DelVecchio.

The holding of this Court in *DelVecchio* is clearly applicable to the facts in this case and warrants a finding that Wilson is not entitled to *habeas corpus* relief. Although the district court did misstate the maximum length of the special parole term, Wilson has failed to demonstrate any prejudice to him because of the error. His sentence to five years imprisonment and a six year special parole term, totalling eleven years, was substantially less than the total of eighteen years-fifteen years imprisonment and a three year special parole term—that the court advised him was the maximum possible sentence. Moreover, similarly to DelVecchio, Wilson was represented by a very experienced attorney and makes no claim now that he would not have pleaded guilty had he been correctly advised regarding the length of the special parole term.³

This Court's decision in *Ferguson v. United States*, 513 F2d 1011 (2nd Cir. 1975), relied upon by the district court in its decision setting aside the plea, may be distinguished on its facts. In *Ferguson*, the defendant pleaded guilty to two counts

³ Apparently, the defendant only complains that he was not properly advised of the possible length of the special parole term. He cannot reasonably complain about the remainder of Judge Elfvin's explanation about the special parole term since it was much more detailed and comprehensive than the court's explanation in *Michel v. United States*, 507 F2d 461, 463 (2nd Cir. 1974).

of distributing marihuana in violation of Title 21, United States Code, Section 841(a)(1). While the district court apparently advised the defendant that the maximum term of imprisonment for each count was five years, no mention was made of the mandatory special parole term at the time of the plea. The defendant was sentenced to five years imprisonment and a five year special parole term on one count, and a consecutive sentence of one year imprisonment and two years special parole on the other count. Therefore, unlike *DelVecchio* and the instant case, the total sentence of six years imprisonment and seven years special parole exceeded the maximum sentence that Ferguson was advised could be imposed. See *Aviles v. United States*, 405 F.Supp. 1374, 1377 n.7 (S.D.N.Y. 1975); and *Bell v. United States*, 521 F2d 713, 715 (4th Cir. 1975). Moreover, as this Court noted in *DelVecchio*, the differences between collateral review and direct appeal of a Rule 11 violation were not briefed or argued in *Ferguson* or discussed in the opinion of the Court.

In *DelVecchio* this Court said that "we are aware of no case in this circuit in which a guilty plea has been vacated on collateral attack for failure to advise of a special parole term where the prison sentence, combined with the special parole term, was less than the possible maximum of which the defendant had been advised" 556 F2d at 111.

The Government submits that Wilson has failed to demonstrate any reason for departing from the law of this Circuit.

Conclusion

For the reasons stated above, the district court's decision and order of August 2, 1977 should be reversed and the defendant's plea of guilty reinstated. Since the district court has not ruled on the effect of the changes in parole guidelines on the defendant's sentence, the case should be remanded to the district court for further proceedings.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: John H. Wilson Jr.

vs

State of New York)
County of Genesee) ss.:
City of Batavia)

USA

No. 77-1352

I, Leslie R. Johnson being
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Leslie R. Johnson

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17th day of November, 1977

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
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